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Supreme Court U.S.
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No. 01-1229

In The
Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

V.

IGNACIO GUILLEN, AS LEGAL GUARDIAN FOR JENNIFER GUILLEN AND ALMA GUILLEN, MINORS; AND MARIANO GUILLEN, AS LEGAL GUARDIAN FOR PAULINA GUILLEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Washington

AMICUS BRIEF OF THE STATE OF LOUISIANA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

This amicus brief is filed on behalf of the State of Louisiana and submitted by its Attorney General, Richard P. Ieyoub. Under Rule 37(4) consent of the parties and leave of this Honorable Court for this filing is not required.

This Honorable Court has granted certiorari to review a decision of the Supreme Court of the State of Washington wherein that court declared a federal statute (23 U.S.C. § 409) unconstitutional. This statute is a procedural rule that provides that records and reports that have been collected and compiled as part of the voluntary participation in federal highway safety improvement programs cannot be either discovered or ultimately used in any manner in any suit for damages.

In pursuit of a lawsuit for damages, the plaintiffs had sought in pre-trial discovery materials and data relating to the accident history for the intersection where their accident occurred. Pierce County interposed § 409 in opposition to the release of the requested accident reports, accident history and associated data within the context of this tort action.

On an eventual appeal, the Washington State Supreme Court ordered the production, holding that § 409 was unconstitutional.

This brief is submitted in support of Pierce County and the State of Louisiana asks that this Honorable Court reverse the decision of the Washington State Supreme Court.

Louisiana, like the State of Washington, receives substantial sums under various federal highway safety improvement programs. To participate in these voluntary

programs, it collects, compiles, and utilizes a significant amount of information, including the types of data and records sought to be discovered by the plaintiffs in this case.

To facilitate candid evaluation and highway safety improvement planning, Congress implemented § 409, creating a discovery and evidentiary bar in tort litigation and thereby choosing to preempt state and federal discovery and evidentiary rules to the contrary that would otherwise allow either the discovery of the material sought by the plaintiffs in this case or its use for any purpose in a suit for damages.

Louisiana is one of the few states whose courts have addressed the constitutionality of this federal statute. Its courts have found the statute to be a permissible preemption of its state discovery and evidentiary rules as Congress has a relevant and valid interest reasonably related to a specific worthwhile national program.

Louisiana recognizes that this preemption is in the exercise of the worthy goal of Congress to improve the safety of this nation's highways. Louisiana asserts, as does Pierce County, that the accident reports, accident history, and other data requested by the plaintiffs are protected by the statute from discovery or other use in this trial for damages.

SUMMARY OF THE ARGUMENT

In its brief, Pierce County, presents valid reasons why this Honorable Court should reverse the decision of the Washington State Supreme Court.

There are other equally valid reasons why this Honorable Court should reverse the decision of the Washington State Supreme Court as Congress has a valid federal interest in preempting state court discovery and evidentiary rules in the furtherance of promoting the safety of our nation's highways.

States are required to collect and compile accident information in order to obtain federal-aid funding for highway safety improvements and to insure that those funds are being obtained and utilized in a priority manner. The sole source of the data required to be collected and compiled is the accident report completed by the investigating officers.

As such, these accident reports and the accident histories generated from those reports are the necessary antecedents to the planning and evaluation process and are specifically the type of document protected by § 409 from discovery or other use in a civil suit for damages such as this.

Further, an accident report is protected from use regardless of whether such a report was prepared exclusively for safety improvements or whether such a report is available for other uses in non-tort proceedings, regardless of whether the report was prepared by highway officials or by police, and regardless of which public agency maintains custody of the report. To hold otherwise would circumvent the clear expression of the intent of Congress to limit to the use of such a report.

It is crucial to note that § 409 is but one of several federal statutes that impose exact or similar discovery and evidentiary restrictions in suits in tort. If the decision of the Washington State Supreme Court is allowed to stand,

the validity of those statutes would become at issue, attacking the legitimacy of Congress to determine terms and inducements to effectuate the implementation of its programs.

ARGUMENT

1. Congress has the constitutional right to create national highway safety improvement programs and to condition the voluntary participation in those programs on the acceptance of the terms of a contractual agreement that is in furtherance of a relevant and valid interest reasonably related to a specific worthwhile national program

a. The right of Congress to create federal-aid programs and to condition the voluntary participation in those programs

This Honorable Court has long recognized, that pursuant to Congress' power to legislate under the Spending Clause (U.S. Const. Art. I, § 8, cl. 1), Congress may fix the terms on which it may disburse federal money to the states. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

Legislation enacted pursuant to the spending power is in the nature of a contract. *Pennhurst*, *supra* at 17. In return for federal funds, the states agree to comply with the conditions that Congress has attached to its offer. *Pennhurst*, *supra* at 17; *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

A prospective recipient state is free to decline a grant of federal funding. *New York v. United States*, 505 U.S. 144, 168 (1992). Similarly, a current recipient may withdraw

from a federal program and decline further funding if it so chooses. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1399 (11th Cir. (Ga.) Aug. 21, 1997), *reversed on other grounds*, *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), citing *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 596 (1983).

The freedom of recipients to decline a grant of federal funding ensures that they will remain responsive to the preferences of their local constituents. *New York v. U.S.*, *supra* at 168.

Valid conditions imposed with federal funding bear a relationship to the purpose of the federal spending. *New York v. U.S.*, *supra* at 168, citing *South Dakota v. Dole*, *supra* at 207-208.

b. The valid interest of Congress in promoting highway safety and the effective spending of public funds

While any number of federal highway safety programs are available to the states and to local governments, the one most applicable in the instant case is the Hazard Elimination Program (23 U.S.C. § 152).[1]

The Code of Federal Regulations implementing § 152 and other federal highway safety programs require that

[1] Pierce County had identified this intersection as especially hazardous and applied for federal hazard elimination funds under § 152. That application was denied. The County then reapplied on April 3, 1996, and on July 26, 1996, three weeks after this fatal accident, the application was granted. See, decision of Washington State Supreme Court, *Guillen v. Pierce County*, 31 P.3d 628, 633 (Wash. Sep. 13, 2001).

the states comply with certain conditions to receive federal-aid funds. 23 C.F.R. §§ 1.1, 1.9; *People of State of Cal. ex rel. Dept. of Transp. v. U.S.*, 27 Fed.Cl. 130 (Fed.Cl. Oct. 30, 1992): "This regulation, in mandatory terms, prohibits federal fund participation in any cost incurred in violation of federal or state law, the regulations set forth in the C.F.R., or as prescribed by policies and procedures of the Administrator of FHWA."

Among these regulations are ones that require that the states collect and compile accident histories, which are of course dependent upon the collection and compilation of accident reports, for analysis of locations for planning potential improvements and evaluating the proposed measures at those locations.[2]

This obligation to conduct and systematically maintain an engineering survey is for *all* public roads, not just those that may be part of a state highway system (§ 152(a)(1)), as funds authorized to carry out the hazard elimination

[2] See, i.e., 23 C.F.R. § 924.9 Planning (Highway Safety Improvement Program).

> "(a) The planning component of the highway safety improvement program shall incorporate:
>
> "(2) A process for analyzing available data to identify highway locations, sections and elements determined to be hazardous on the basis of *accident experience* or accident potential."

See, also, 23 C.F.R. § 924.13 Evaluation (Highway Safety Improvement Program).

> "(a) The evaluation component of the highway safety improvement program in each State shall include a, including:
>
> "(2) *A record of accident experience before* and after the implementation of a highway safety improvement project."

program are available for expenditure on *any* public road (§ 152(c)(1)).[3]

An additional condition imposed in order to secure the federal funds is that the states report to the Secretary of Transportation on a yearly basis the progress being made to implement safety improvement projects for hazard elimination and the effectiveness of those improvements. Each state report *shall* contain, among other things, "the *previous* and subsequent *accident experience* at these locations." (§ 152(g)). This report *shall* also contain "the *previous* and subsequent *accident experience* at improved locations." (§ 152(g)).

The trade-off for these requirements that such accident experience be compiled, collected, and utilized to plan and evaluate safety improvements and then that those evaluations be systematically reported to the Secretary of Transportation is the protection afforded by § 409 that the enforced compilation and collection of such data not then be subject to either discovery (as at issue in this case) or otherwise used in a tort action (which is, of course, the ultimate result of the Washington State Supreme Court's decision).

[3] In addition to the local projects authorized under § 152, numerous highway safety improvement programs also address the additional ability of local governments to apply for federal funding of local projects for hazard elimination on their roads and bridges, see, i.e., 23 U.S.C. § 133 (Surface Transportation Program). These additional hazard elimination projects, and the availability of federal funding, are also conditioned on the analysis of justifying data to affect a proper prioritization in the expenditure of both federal and local funds and are often under the administration of the states.

This trade-off was expressly recognized by the Federal Highway Administration in its attempts to implement § 409.

In a May 4, 1983, memorandum regarding the "Proposed Amendment to Highway Safety Legislation" (reprinted in full at Appendix A), the Associate Administrator for Safety, Traffic Engineering, and Motor Carriers at the time, Marshall Jacks, Jr., argued:

> "For the past several years, we have attempted to include in the Department's legislative program a provision to protect from disclosure information compiled by States to identify and prioritize roadway hazards. It has been consistently brought to our attention that highway departments are reluctant to undertake such efforts (as required by 23 USC 152, for instance) for fear that acknowledging the existence of hazardous conditions would expose them to liability.
>
> It is noted that our suggestion was included in DOT's Legislative Program for the 97th Congress, 2nd Session, in the second category. We also note that highway safety legislation is being introduced in this legislative session. In the event such safety legislation receives serious consideration, it is recommended that an amendment be included to protect information compiled for purposes of safety enhancement."

The memorandum went on to set out proposed language for such an amendment, language virtually identical to that of the subsequently enacted § 409.

c. The constitutionality of § 409

By determining that there is no relevant and valid federal interest reasonably related to a specific worthwhile national program, the Washington State Supreme Court reached a decision in direct conflict with contrary determinations by the state supreme courts of Missouri, Mississippi, and Louisiana.

In *Claspill v. Missouri Pacific R. Co.*, 793 S.W.2d 139, 141 (Mo. 1990), *cert. denied*, 498 U.S. 984 (1990), the Missouri State Supreme Court held, that in creating § 409, Congress was acting in constitutional concert with the Commerce Clause (U.S. Const., art. I, § 8, cl. 3), citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985) and *South Carolina v. Baker*, 485 U.S. 505 (1988).

A constitutional challenge was also rejected by the Mississippi State Supreme Court in *Sawyer v. Illinois Cent. Gulf R. Co.*, 606 So.2d 1069 (Miss. 1992). In finding no basis for a constitutional rejection of § 409, that court noted:

> "[N]obody made Mississippi get into the railroad crossing safety enhancement program. It is a voluntary program. Duly authorized officials of this state, however, have committed us to the program – in exchange for ninety percent federal funding – and it does not strike us outrageous that we should accede to the federal government's rules and regulations appertaining thereto. We have it on good authority that Missouri and Louisiana have rejected challenges to Section 409. See *Claspill v. Missouri Pacific Railroad Co.*, 793 S.W.2d 139 (Mo. 1990); *Martinolich v. Southern Pacific Transportation Co.*,

532 So.2d 435 (La. Ct.App. 1988). We accept Section 409 as controlling, as well." 606 So.2d at 1074.

In *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So.2d 170 (La. Nov. 29, 1993), *cert. denied, Louisiana Dept. of Transp. and Development v. Wiedeman*, 511 U.S. 1127 (1994), the Louisiana State Supreme Court noted, that despite the State's substantial interest in the application of its discovery and evidentiary rules:

> "§ 409's explicit preemptive language overrides conflicting state law by virtue of the Supremacy Clause. U.S. Const. art. VI, cl. 2; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, 613 (1977). Section 409 controls. *Beecher v. Keel*, 607 So.2d 549 (La.1992). See also *Claspill v. Missouri Pacific Railroad Company*, 793 S.W.2d 139, 140 (Mo. banc 1990)." 627 So.2d at 172.[4]

A federal court for Louisiana, *Gaubert v. Denton*, 1999 WL 350103 (E.D.La. May 28, 1999), *affirmed by*, 210 F.3d 368 (5th Cir. (La.) Feb. 17, 2000), has also found that § 409 violates neither procedural due process nor the right of access to the courts.

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[4] The Louisiana State Supreme Court also rejected a constitutional challenge to § 409 in *Reichert v. State, Dept. of Transp. and Development*, 96-1419, p.7 (La. 5/20/97), 694 So.2d 193, 199, as have Louisiana state appellate courts. See, i.e., *Martinolich v. Southern Pacific Transp. Co.*, 532 So.2d 435 (La.App. 1 Cir. 1988), *writ denied*, 535 So.2d 745 (La. 1989), *cert. denied, Louisiana Dept. of Transp. and Development v. Nick Martinolich, Inc.*, 490 U.S. 1109 (1989), and *Palacios v. Louisiana and Delta R.R., Inc.*, 2000-00971 (La.App. 3 Cir. 12/29/00), 775 So.2d 698, *writ denied*, 2001-0565 (La. 5/4/01), 791 So.2d 653.

In rejecting the challenges to § 409 under the First, Fifth, Tenth, and Fourteenth Amendments to the United States Constitution, the *Gaubert* court commented that "every court that has considered the privilege, both federal and state, has concluded that it serves the legitimate purpose of fostering the collection and evaluation of highway safety information free from the threat of future tort actions."[5]

That court, in applying the holding of *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939), to the facts at hand, further found that the plaintiff lacked standing to bring his Tenth Amendment challenge.

2. A state's public record law is preempted by § 409

The Washington State Supreme Court also held, that as to the requested accident reports, history and associated data, prohibiting discovery under § 409 was in contravention of that state's Public Disclosure Act.

In *Ex parte Alabama Dept. of Transp.*, 757 So.2d 371 (Ala. Dec. 17, 1999), the Alabama Supreme Court faced a similar situation. After finding that § 409 preempted state discovery statutes, that court further found that the statute also preempted that state's public document laws as to the rights of citizens to inspect and copy public writings.

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[5] *Gaubert v. Denton*, *supra* at p.9.

In so holding, that court noted:

"[U]nder the facts of this case, the application of § 36-12-40 [the Alabama public inspection law] would make it impossible for ALDOT to comply with § 409, as amended in 1995, and with the expressed intent of Congress with regard to the amended § 409. See *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 110 S.Ct. 2024, 109 L.Ed.2d 474 (1990). Thus, where § 36-12-40 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress' (*id.*, at 506, 110 S.Ct. 2024), that section is preempted by the federal law. See, also, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993)." 757 So.2d at 374.[6]

A Tennessee state appellate court also rejected a Tenth Amendment challenge to the supremacy of § 409 and found that § 409 did constitutionally bar the discovery of a location's accident history despite that state's Public Records Act. See *Seaton v. Johnson*, 898 S.W.2d 232, 236 (Tenn.Ct.App. Jan. 27, 1995), *appeal denied*, (May 01, 1995): "It would be an anomaly for this Court to deny access to the State's copy of its report to the federal government only to require the State to compile from its records a report to plaintiff identical with that furnished to the federal government."

[6] It is also noted that in *Ex parte Alabama Dept. of Transp.*, *supra*, the Alabama Supreme Court added in *dicta* that:

> "[T]he information sought by Hitchcock – reports of accidents occurring at the site of Hitchcock's accident – is under the custody and control of the Alabama Department of Public Safety. Hitchcock is not without a source for the information he alleges he requires in order to be able to proceed with any legal action to recover damages for his injuries." 757 So.2d at 374.

For the reasons expressed herein, it is submitted that this gratuitous comment on an issue not before that court was erroneous.

The present situation is analogous to one faced by this Honorable Court before.

In *United States v. Weber Aircraft Corporation*, 465 U.S. 792 (1984), this Court held that an investigative report conducted pursuant to Air Force regulations providing that such safety investigations were not to be used for any purpose other than accident prevention was exempt from discovery in a civil suit as an exception under the Freedom of Information Act.[7] This Court also stated that to allow the obtaining through the FOIA of material that was normally privileged would create an "anomaly" in that the FOIA could then be used to supplement civil discovery, a construction of the FOIA that the Court had consistently rejected.[8]

Nothing in § 409 takes public information about accidents and converts it to private, secret information. The analysis can be, and often is, publicized widely. However, this analysis, and the material gathered to formulate that analysis, just cannot then be subject to discovery within the context of this suit for damages *or* otherwise used in a courtroom to obtain a money judgment

[7] 5 U.S.C. § 552.

[8] *United States v. Weber Aircraft Corporation*, 465 U.S. at 801.

for damages, whether against a state, municipal government, or private entity.

3. The accident reports sought by the plaintiffs are the type of document protected from discovery or other use contemplated by § 409.

To comply with the planning and evaluation requirements of § 152 to provide a "process for analyzing available data to identify highway locations, sections and elements determined to be hazardous on the basis of accident experience or accident potential"[9] and a "process for determining the effect that highway safety improvement projects have in reducing the number and severity of accidents and potential accidents,"[10] states such as Washington (and Louisiana) use an accident report form.

This report form is actually a data collection form with over 110 separate data fields that are entered by an investigator. As noted by Pierce County, these reports are completed not by highway department employees, but by investigating state, county, or municipal police officers. The original reports themselves are maintained by those entities.

In Louisiana, copies of these reports are forwarded on a periodic basis to the Louisiana Highway Safety Commission which in turn forwards the reports to the Hazard Elimination Program Section of the Department of Transportation and Development for "spotting." Spotting is a

[9] See 23 C.F.R. § 924.9(a)(2), *supra*.

[10] See 23 C.F.R. § 924.13(a)(2), *supra*.

process by which DOTD employees place information on the report to identify that report with a specific section of highway. The reports are then returned to the safety commission which, using 23 U.S.C. § 402 funding, enters the collected data into a computer program. The copies of the reports are usually discarded after completion of the entry process by the safety commission.[11]

After entry, the completed program is then made available to the DOTD and other highway and traffic agencies in the state, including parish and municipal highway engineering sections, for use in identifying areas of safety concerns (whether they be in highway design or maintenance or motorists behavior) and, when combined with highway descriptive criteria maintained by the highway departments in separate databases, in obtaining and justifying appropriate funding. Because of the high matching nature of federal-aid funding (approximately 75-90% in most cases), federal funds for any highway safety improvement are almost always sought under either § 152 or one of the other over 70 federal-aid programs. Every state, including Washington, follows a similar process, using similar forms, and making application for federal funds under the same federal-aid programs.

The beneficial use of such accident reporting forms in identifying highway safety concerns is recognized by the Federal Highway Administration and required through its

[11] In Louisiana, the larger metropolitan areas have the capacity to directly enter the data fields into a local computer program and then forward the program to the safety commission on a periodic basis.

Model Minimum Uniform Crash Criteria (MMUCC)[12] program:

> "MMUCC includes 75 minimum data elements that need to be collected by police at the crash scene and an additional 38 data elements that can be derived (11 data elements) from those that are collected at the scene or obtained by linking (27 data elements) to other data files, e.g., roadway data, injury data, etc. The total 113 data elements represent a 'model' data set which can be expanded as necessary to meet a state's specific needs."[13]

The criteria for the MMUCC is that criteria for the completion of the accident report by the investigating officer.[14] This completed accident report is the sole source

[12] The Transportation Equity Act for the 21st Century, Public Law 105-178, provided an additional and supplemental program, 23 U.S.C. § 411, to encourage states to follow uniform guidelines in collecting crash information as required under 23 U.S.C. § 402 for the implementation of the numerous federal-aid highway safety improvement programs (i.e., § 152). These guidelines are found at 23 C.F.R. § 1335.1 et seq. The Model Minimum Uniform Crash Criteria (MMUCC), found in part at Appendix B, is provided for by 23 C.F.R. § 1335.3(e). See, also, Federal Register, August 10, 2000 (Volume 65, Number 155), pages 48905-48911.

[13] See App. 7, MMUCC, August 1998, Executive Summary. See also, App. 12, MMUCC, Introduction:

> "Data recorded on crash reports are computerized into a central, electronic crash data file at the state level. These statewide motor vehicle crash databases provide the basic information necessary for developing effective highway and traffic safety programs. Data from state crash data systems are used by local, state and federal agencies to: identify and prioritize highway and traffic safety problem areas."

[14] See App. 18, MMUCC, List of Model Minimum Uniform Crash Criteria.

of the information necessary for planning, evaluating, and prioritizing highway safety improvements and justifying the applicability of federal-aid funds.

The guidelines for the MMUCC specifically note that:

> "Statewide motor vehicle traffic crash data systems provide the basic information necessary for effective highway and traffic safety efforts at any level of government – local, state or federal. State crash data are used to perform problem identification, establish goals and performance measures, determine progress of specific programs, and support the development and evaluation of highway and vehicle safety countermeasures."[15]

It should also be noted that the State of Washington's Traffic Safety Commission was involved in the development of the MMUCC guidelines.[16]

4. The accident report sought by the plaintiffs in this suit for damages is protected from discovery or other use, regardless of whether it was prepared exclusively for safety improvements or whether it is available for other uses in non-tort proceedings and regardless of whether it was prepared by highway officials or is in their custody.

There is no limiting requirement in § 409 that the information obtained by the investigating officer in completing the accident report be solely available for use by

[15] See App. 7, MMUCC, August 1998, Executive Summary.

[16] See App. 9, MMUCC, Acknowledgments.

highway officials. Nor is there any requirement that the report be compiled by highway officials. And there is no requirement that the report sought be exclusively in the custody of highway officials and not in the custody of third-parties such as local or state police.

a. The rules of statutory construction

To allow the Washington Supreme Court to create such requirements, and such requirements would need to be created as they do not exist in the language of § 409, would be to create an "anomaly" and a failure to follow the established rules of statutory interpretation.

This Honorable Court has consistently noted that in any case of statutory construction, the Court's analysis begins with an examination of the language of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999), citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Carter v. U.S.*, 530 U.S. 255, 271 (2000). And where the statute's language provides a clear answer, the analysis ends there as well. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. at 438, citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254.

In statutory interpretation, it is understood that Congress says in a statute what it means and means in a statute what it says there. *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000), citing *Connecticut National Bank v. Germain*, *supra* at 254. As a corollary, courts cannot create requirements in the statute that are not expressed and specifically should not create requirements that would contravene the clear expression of congressional intent.

Congress clearly expressed its intent in § 409 that the material collected and compiled in the furtherance of improving highway safety was not subject to use in a civil suit for damages. As this Honorable Court has noted, when Congress has intended materials and reports not to be subject to compulsory process, it has said so. See, i.e., *St. Regis Paper Co. v. U. S.*, 368 U.S. 208, 219 (1961).

b. Accident reports need not be created solely for federal reporting requirements to fall within § 409

Accident reports do not fall outside the scope of § 409 merely because they are not compiled solely for federal reporting purposes and are available for other uses.

An argument that the records of previous accidents were not protected by § 409 because accident reports had been collected by the state for many years prior to the adoption by Congress of § 409 and were available for other uses was eloquently rejected by the court in *Coniker v. State of New York*, 695 N.Y.S.2d 492 (N.Y.Ct.Cl. 7/26/99). That court noted that nothing in the language of § 409 supports the contention that it was only intended to apply in those states that were not enlightened enough to adopt such a program of data collection without the federal carrot-and-stick:

> "[I]ndeed its [§ 409] purpose – to encourage states to fully and honestly compile and analyze accident data without fear that either its conclusions or its work product would be used against it in subsequent litigation – is equally fostered regardless of whether a particular state decided to initiate such a program before or after the Federal government became involved." 695 N.Y.S.2d at 496.

Numerous other cases support this position. See, i.e., *Lusby v. Union Pacific R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993);[17] *Robertson v. Union Pacific R. Co.*, 954 F.2d 1433 (8th Cir. 1992);[18] *Powers v. CSX Transp., Inc.*, 177 F.Supp.2d 1276 (S.D. Ala. 2001);[19] *Taylor v. St. Louis Southwestern Ry. Co.*, 746 F.Supp. 50 (D. Kan. 1990);[20] and *Mackie v. Grand Trunk Western Railroad Co.*, 544 N.W.2d 709, 711 (Mich.App. 1995).[21]

This Honorable Court has faced similar situations in the past and has not based its decisions upon who prepared a specific document or in whose custody the document resided.

---

[17] "Contrary to Lusby's assertion, state materials do not fall outside the scope of § 409 merely because they are not compiled solely for federal reporting purposes and are available for other uses." *Lusby v. Union Pacific R. Co.*, *supra* at 641.

[18] "FN3. Appellants' assertion that the formula and automobile count were admissible because such information was not collected or utilized solely for federal funding projects is without merit. Although such information was available for other uses and purposes, the statute's mandatory language requires exclusion of such evidence at trial. 23 U.S.C. § 409." *Robertson v. Union Pacific R. Co.*, *supra* at 1435.

[19] "The Court agrees with those authorities holding that Section 409 does not require that the sole purpose for compilation or collection be one specified in the statute." *Powers v. CSX Transp., Inc.*, *supra* at 1278.

[20] "Given the clear mandate of Section 409, the court finds that any 'reports, surveys, schedules, lists or data' . . . whether obtained from the Kansas Department of Transportation ('KDOT'), the Kansas Corporation Commission ('KCC'), Jefferson County or Union Pacific, are inadmissible." *Taylor v. St. Louis Southwestern Ry. Co.*, *supra* at 54.

[21] "To promote these goals, a document that otherwise falls within the ambit of § 409 must be considered inadmissible even though it fulfills a state as well as a federal function." *Mackie v. Grand Trunk Western Railroad Co.*, *supra* at 711.

In *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, (1989), a contractor argued that the FOIA exemption/privilege interposed by a governmental agency was not applicable as not that agency but another had prepared or compiled the documents sought. The contractor also argued that the exemption/privilege did not apply as the documents were not originally prepared for the purpose stated in the exemption.

This Honorable Court rejected both arguments:

> "As is customary, we look initially at the language of the statute itself. The wording of the phrase under scrutiny is simple and direct: 'compiled for law enforcement purposes.' The plain words contain no requirement that compilation be effected at a specific time. The objects sought merely must have been 'compiled' when the Government invokes the Exemption. A compilation, in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents. See Webster's Third New International Dictionary 464 (1961); Webster's Ninth New Collegiate Dictionary 268 (1983). This definition seems readily to cover documents already collected by the Government originally for non-law-enforcement purposes. See *Gould Inc. v. General Services Administration*, 688 F.Supp. 689, 698 (DC 1988).
>
> "The Court of Appeals, however, throughout its opinion would have the word 'compiled' mean 'originally compiled.' See 850 F.2d, at 109. [Footnote omitted] We disagree with that interpretation for, in our view, the plain meaning of the word 'compile,' or, for that matter, of its adjectival form 'compiled,' does not permit such refinement. This Court itself has used the word

'compile' naturally to refer even to the process of gathering at one time records and information that were generated on an earlier occasion and for a different purpose. See *FBI v. Abramson*, 456 U.S., at 622, n. 5, 102 S.Ct., at 2060, n. 5; Reporters Committee, *supra*." 493 U.S. at 153-154.

As such, it does not logically follow that if the reports themselves may have been prepared by others and available for other uses that the question of their protection from discovery and use by § 409 would then be dependent upon their custodian. To hold otherwise is to place a restrictive condition upon § 409 that does not exist in the statute and impedes giving the statute its full meaning. This restrictive condition would result in § 409 being construed in a nonfunctional way.[22]

5. The federal statute (§ 409) is but one of several federal statutes that impose exact or similar discovery and evidentiary restrictions in suits in tort, and if the decision of the Washington State Supreme Court is allowed to stand, the validity of those statutes would become at issue, attacking the legitimacy of Congress to determine terms to effectuate the implementation of its programs

The provision of § 409 that the "reports, surveys, schedules, lists, or data compiled or collected" pursuant to a highway safety improvement program "shall not be

[22] *John Doe Agency v. John Doe Corp., supra* at 157: "The statutory provision that records or information must be 'compiled for law enforcement purposes' is not to be construed in a nonfunctional way."

subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages" is not unique. Several other federal statutes or regulations contain similar restrictions on either the discovery or evidentiary use of such material or reports compiled or collected pursuant to federal requirements.[23]

This Honorable Court has held such a restrictive statute to be constitutional. See *Baldrige v. Shapiro*, 455 U.S. 345 (1982), upholding 13 U.S.C. § 9(a) which provides: "Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding."

Of specific import is a similar discovery and evidentiary restriction established by 23 U.S.C. § 402, the

[23] See, i.e., 13 U.S.C. § 9(a) (census reports); 10 U.S.C. § 1102(b) and 14 U.S.C. § 645(b) (medical quality assurance records created by or for the Department of Defense); 21 U.S.C. § 360i(b)(3) (medical device user facility reports); 15 U.S.C. § 2055 (consumer product safety reports); 20 U.S.C. § 9007(b)(1) (national educational statistical reports); 33 U.S.C. § 930(c) (injury reports for longshore and harbor workers' compensation); 49 U.S.C. § 504(f) (motor carrier accident reports); 49 U.S.C. § 1154(a)(5)(b) (discovery and use of cockpit and surface vehicle recordings and transcripts); 49 U.S.C. § 1154(b) ("[n]o part of a report of the [National Transportation Safety] Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report."); 49 U.S.C. § 20703(c) (locomotive accident reports); 49 U.S.C. § 20903 (railroad carrier accident and incident reports); and 49 U.S.C. § 47507 (nonadmissibility of noise exposure map and related information as evidence).

implementing statute for Congress' highway safety programs. This statute requires that each state "*shall* have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths."

Further, § 402 provides that state programs:

> "... *shall* include but not be limited to, provisions for an *effective record system of accidents* (including injuries and deaths resulting therefrom), *accident investigations* to determine the probable causes of accidents, injuries, and deaths, ... highway design and maintenance (including lighting, markings, and surface treatment), traffic control, ... surveillance of traffic for detection and correction of high or potentially high accident locations ..." (*emphasis supplied*)

Again, as part of the trade-off for being required to collect and compile such information as part of the federal program to improve highway safety, a provision restricting the discovery and use of that information identical to § 409 is provided by § 402(k)(1):

> "Notwithstanding any other provision of law, if a report, list, schedule, or survey is *prepared by or for a State or political subdivision thereof* under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey." (*emphasis supplied*)

This statute has not been the subject of much litigation but was found to be constitutional by the federal Eastern District of Louisiana court in *Gaubert v. Denton*, *supra*.

As noted earlier, when Congress has intended materials and reports not to be subject to compulsory process, it has said so. *St. Regis Paper Co. v. U. S.*, *supra* at 219.

Congress has said so about the material sought to be discovered by the plaintiffs in this tort suit. As with the similar statutes, this explicit expression of Congress' intent should be enforced by this Honorable Court by reversing the decision of the Washington State Supreme Court.

CONCLUSION

The decision of the Washington State Supreme Court holding § 409 unconstitutional and allowing the discovery of the reports of previous accidents at this accident site should be reversed so as to give § 409 the full measure of congressional intent protecting such reports, to prevent a disparate interpretation of similar federal statutes, and to provide clear guidance on this important federal question.

Respectfully Submitted,

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APPENDIX A

The Proposed Amendment to Highway Safety Legislation, U.S. Department of Transportation, Federal Highway Administration, May 4, 1983, Memorandum of Marshall Jacks, Jr.

Memorandum

[LOGO]
US Department
of Transportation

Federal Highway
Administration

Date May 4, 1983

Reply to
Attn of: HSA-1.1

Subject:

Proposed Amendment to Highway Safety Legislation

From:

Associate Administrator for Safety, Traffic Engineering, and Motor Carriers

To:
HCC-1

Mr. D. L. Ivers
Chief Counsel

For the past several years, we have attempted to include in the department's legislative program a provision to protect from disclosure information compiled by States to identify and prioritize roadway hazards. It has been consistently brought to our attention that highway departments are reluctant to undertake such efforts (as required in 23 USC 152 for instance) for fear that acknowledging the existence of hazardous conditions would expose them to liability. The issue has once

more been raised, this time by the American Association of Railroads, in connection with requirements placed on them by States in identifying hazardous rail-highway crossings pursuant to Sec. 203(a) of the Highway Safety Act of 1973.

It is noted that our suggestion was included in DOT's Legislative Program for the 97th Congress, 2nd session, in the second category. We also note that highway safety legislation is being introduced in this legislative session. In the event such safety legislation receives serious consideration, it is recommended that an amendment be included to protect information compiled for purposes of safety enhancement. The following language is suggested:

> "Notwithstanding any other provision of law, no report, list, schedule or survey compiled by or for a State for the purposes of complying with any requirement of Title 23, United States Code, or the Highway Safety act of 1973 concerning the evaluation of hazardous roadway conditions or rail-highway crossings in order to plan and prioritize projects to enhance safety, shall be required to be made available under 5 USC 552 (Freedom of Information Act), or admitted to evidence or used for any other purpose in any suit or action for damages arising out of any matter mentioned in such report, list, schedule or survey."

It is the intent of this provision to prevent the unauthorized disclosure of information that States compile in good faith to meet the purposes of Federal-aid highway programs to eliminate or reduce hazardous roadway conditions. (e.g. 23 USC 152 and Sec. 203 of the Highway Safety Act of 1973). It is also the intent to protect information that may be compiled by railroads or utility companies for States in identifying hazards in connection with these programs. Precedent for such

protection is found in sec. 220(f) of the Interstate Commerce Act (49 USC 320(f), recodified as 49 USC 504(f).

We will be pleased to provide any additional assistance that may be necessary to implement this recommendation.

MARSHALL JACKS, JR.
Marshall Jacks, Jr.

APPENDIX B

Excerpts from Final Model Minimum Uniform Crash Criteria (MMUCC), U.S. Department of Transportation, National Highway Traffic Safety Administration, Federal Highway Administration, August 1998. The entire document (127 pages) can be found at http://www/nhtsa.dot.gov/people/ncsa/Codes/MinData/MMUCCaugust98.pdf.

[LOGO]

U.S. Department of Transportation

National Highway Traffic Safety Administration

Federal Highway Administration [LOGO]

FINAL

Model Minimum Uniform Crash Criteria (MMUCC)

August 1998

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* * *

Executive Summary

Statewide motor vehicle traffic crash data systems provide the basic information necessary for effective highway and traffic safety efforts at any level of government – local, state or federal. State crash data are used to perform problem identification, establish goals and performance measures, determine progress of specific programs, and support the development and evaluation of highway and vehicle safety countermeasures.

Unfortunately, the use of state crash data is often hindered by the lack of uniformity between and within states. While standards exist for collection of crash data, their use and application is inconsistent. For example, states do not collect the same information on their crash reporting forms, crash and data element definitions may differ, similar data elements may have different meanings, and/or others may have the same meanings but different values. Inconsistent data within a state, or between multiple states, can result in incorrect interpretations, thus limiting the usefulness of the information.

Many states have recently revised their crash data reporting form, and others are now in the process of doing so. Several states, during their revision process, have contacted National Highway Traffic Safety Administration (NHTSA) or Federal Highway Administration (FHWA) seeking guidance. At national meetings, there have been informal requests for national guidelines for states to use when revising crash forms or working with software vendors. The Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 required DOT to "ensure national uniform data" and to "establish minimum criteria" for reporting of highway deaths and injuries. Renewal of this legislation as the 1998 Transportation Equity Act for the Twenty First Century (TEA21) provides incentives

for states developing plans that include implementation of model data elements approved by the Secretary of Transportation.

NHTSA and FHWA are cooperating with the National Association of Governors' Highway Safety Representatives (NAGHSR) to develop model minimum uniform crash criteria (MMUCC). Development of MMUCC has been structured to obtain maximum input from all sectors of the highway safety community. Over a 20 month period, a straw model was proposed and then revised according to feedback received at meetings, via the Web, email, phone, mail, etc. before producing this final version.

MMUCC includes 75 minimum data elements that need to be collected by police at the crash scene and an additional 38 data elements that can be derived (11 data elements) from those that are collected at the scene or obtained by linking (27 data elements) to other data files, e.g., roadway data, injury data, etc. The total 113 data elements represent a "model" data set which can be expanded as necessary to meet a state's specific needs.

A study of the feasibility of implementing MMUCC evaluated the data elements collected by the 17 states providing crash data to NHTSA for its State Data System. These seventeen states are currently collecting about 60% of the 75 MMUCC data elements needing to be collected by police at the scene. And on average, they collect an additional 28 data elements not included in MMUCC.

Implementation of MMUCC will facilitate improved crash data for highway and traffic safety injury control and public health purposes at the local, state, and federal levels.

* * *

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* * *

INTRODUCTION

Background

A motor vehicle crash report describes characteristics of the crash, the vehides and people (drivers, injured and uninjured occupants and injured pedestrians and bicyclists) involved. On it, the police officer also records the results of his or her investigation of the crash. By using evidence found at the scene, and by interviewing participants and witnesses the inveshgating officer may answer such questions as:

- "in what directions were the involved vehicles and pedestrians moving prior to impact?";
- "What occurred at the time of impact?"; and,
- "What factors may have contributed to the crash?"

Data recorded on crash reports are computerized into a central, electronic crash data file at the state level. These statewide motor vehicle crash databases provide the basic information necessary for developing effective highway and traffic safety programs. Data from state crash data systems are used by local, state and federal agencies to:

- identify and prioritize highway and traffic safety problem areas;
- assess the effectiveness of laws and programs intended to reduce the frequency and severity of motor vehicle crashes and injuries; and,
- assess the relationship between vehide and highway characteristics, crash propensity, and injury severity to support either the development of countermeasures or their evaluation.

At the Federal level individual crash reports also provide the basis for national crash information systems, either as the sampling frame or as a source of data. Data from these national systems are utilized in highway safety decision making by agencies at all levels of government.

Problem

Crash data lack uniformity between the states and, often, within a state. Beyond a basic set of data elements, states collect different data elements on their crash reports. Where there are similar data elements, they often have different meanings. Or the names may be the same but the attribute values vary. Within a state, local police may interpret crash element definitions differently when documenting the same type of event. Reporting thresholds for the types of traffic crash for which data are collected also differ among states and may even be implemented differently within a State.

Lack of uniform reporting makes the use and comparison of state crash data difficult. Different elements and definitions within a state can result in inconsistent data and, potentially, incorrect interpretations of data. The same is true when states have different reporting requirements and dissimilar crash data elements – accurate comparisons are difficult, and states can not draw on the experience of other states. When analyses use two or more state crash data files, results have to be examined closely to ensure that they are not due to differences in the data collected and coded by these states.

Existing national standards for collecting information about motor vehicle traffic crashes are not uniformly implemented. The *Manual on Classification of Motor*

Vehicle Traffic Accidents, the American National Standards Institute (ANSI) Standard D16.1, was developed to "promote uniformity and comparability of motor vehicle accident statistics." ANSI Standard D20.1, *Data Element Dictionary for Traffic Records Systems*, was developed to "provide a common set of coding instructions for data elements related to highway safety . . . " While the goals of these standards are to promote uniformity and comparability of motor vehicle traffic crash statistics, their use and application is inconsistent between states and even within a state.

States periodically revise their crash reporting forms. In a recent study conducted by the National Association of Governors' Highway Safety Representatives (NAG HSR) for the National Highway Traffic Safety Administration (NHTSA), eighteen states indicated that they are in the process of revising their crash reporting form, or will revise it, by 2000. Many are being spurred to do so by the availability of new technologies such as hand-held computers for data collection. Others are doing so in an effort to reduce the reporting and processing burden on state and local police agencies. Several states, during their revision process, have contacted NHTSA or the Federal Highway Administration (FHWA) to inquire as to what elements these agencies recommend to be collected on crash reporting forms. At recent national meetings and forums, traffic safety information collectors and users have asked for guidelines for states to use when revising their crash forms or when working with software vendors. The National Safety Council's (NSC) Traffic Records Committee studied the issues related to collection and use of highway safety information and issued a report entitled *A NATIONAL AGENDA for the Improvement of Highway*

Safety Information Systems. Goal VI of the National Agenda calls for establishing and promoting "technical standards of highway safety information systems." It specifically recommends promoting "the use of . . . existing standards and other recommended guidelines."

Section 2002(a) of The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) addressed the issue of collection and reporting by states of data on traffic related deaths and injuries and directed the Secretary to establish a program collecting such information from the states. It stated that, "The purposes of the program are to ensure national uniform data on such deaths and injuries and to allow the Secretary to make determinations for use in developing programs to reduce such deaths and injuries and making recommendations to Congress concerning legislation necessary to implement such programs." The section went on to say that "The Secretary shall establish minimum reporting criteria for the program;"

The traffic and highway safety communities were asked to respond to the legislative language in Section 2002(a) of the ISTEA by means of a federal regulatory notice. Responders indicated support of uniformity as a concept, but not as a federal requirement. ISTEA was renewed in June 1998 as the Transportation Equity Act for the 21st Century (TEA21). This legislation requires the Secretary of Transportation to recommend model data elements for crash reporting and provides funding incentives to states which demonstrate in a plan how they will implement them.

Benefits of MMUCC to the Highway Safety Community

Uniform criteria, if adopted by states, would assist all levels of users. The advantages of the standardized, statewide elements and definitions introduced by MMUCC include:

- Easier to support state and local highway safety programs because of more consistent and accurate data;
- Possibility for interstate comparisons and analyses;
- Improved collaboration across health and transportation sectors resulting in improved crash data for public health and injury control purposes;
- Enhanced decision making for targeting resources as part of 402, Safe Communities, etc., implementing performance measures, and evaluating program effectiveness;
- Feasibi!ty of linkage to medical outcome global positioning systems, and other highway traffic safety related data, thereby helping identify the cost of specific crash, vehicle, roadway and person characteristics and, ultimately, who pays;
- Collaborative approach so that states learn from each other by sharing their successes, identifying their common problems and working together on joint program priorities;
- Routine monitoring of emerging problems or issues as changes, such as vehicle or highway modifications, are implemented; and,
- Development of common software for crash data entry.

At the national level, comparable state data would expand NHTSA and FHWA analytical capabilities. The collection and coding of information in Federal data systems, most of which are used by state and local agencies, would improve, possibly leading to further revisions and economies in how the data are collected.

* * *

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C4. Crash City/Place 22
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C7. Location of First Harmful Event 23
C8. Manner of Crash/Collision Impact 23
C9. Source of Information 24
C10. Date and Time Crash Reported to Police Agency 24
C11. Weather Condition 24
C12. Ambient Light 25
C13. Road Surface Condition 25
C14. Contributing Circumstances, Environment .. 26
C15. Contributing Circumstances, Road 26
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V6. Commercial Trailer License Plate Number 30
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